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FOR A CHANGING VERMONT

August 27, 2010

Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street – Drawer 20  
Montpelier, Vermont 05602-2701

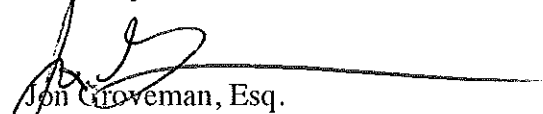
In re: Docket No. 7600

Dear Ms. Hudson:

Enclosed is the Vermont Natural Resources Council (VNRC) and Connecticut River Watershed Council (CRWC) filing addressing the Public Service Board (PSB) jurisdiction in the above matter.

Thank you for your consideration.

Sincerely,



Jon Groveman, Esq.  
VNRC General Counsel

cc: Certificate of Service

### CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of August 2010, I served a copy of the foregoing filing addressing PSB Jurisdiction Docket No. 7600 by first class mail, postage prepaid to:

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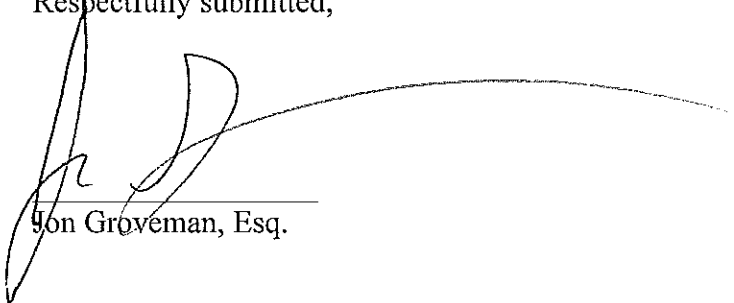
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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jon Groveman', is written over a horizontal line. The signature is stylized with a large, sweeping loop that extends to the right.

Dated at Montpelier, Vermont  
This 27<sup>th</sup> day of August 2010

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Investigation into: (1) whether Entergy Nuclear Vermont )  
Yankee, LLC, and Entergy Nuclear Operations, Inc. )  
(collectively, "Entergy VY"), should be required to cease )  
operations at the Vermont Yankee Nuclear Power Station, )  
or take other ameliorative actions, pending completion of )  
repairs to stop releases of radionuclides, radioactive )  
materials, and, potentially, other non-radioactive materials )  
into the environment; (2) whether good cause exists to )  
modify or revoke the 30 V.S.A. § 231 Certificate of Public )  
Good issued to Entergy VY; and (3) whether any penalties )  
should be imposed on Entergy VY for any identified )  
violations of Vermont statutes or Board orders related to )  
the releases )

Docket No. 7600

**VERMONT NATURAL RESOURCES COUNCIL AND CONNECTICUT RIVER**  
**WATERSHED COUNCIL BRIEF REGARDING PUBLIC SERVICE BOARD**  
**JURISDICTION**

**I. INTRODUCTION**

This Docket was opened by the Vermont Public Service Board (PSB) to address the leaks at Vermont Yankee. Specifically, the Docket investigates whether (1) Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Entergy VY), should be required to cease operations at the Vermont Yankee Nuclear Power Station, or take other ameliorative actions, pending completion of repairs to stop releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment; (2) good cause exists to modify or revoke the 30 V.S.A. § 231 Certificate of Public Good issued to Entergy VY; and (3) any penalties should be

imposed on Entergy VY for any identified violations of Vermont statutes or Board orders related to the releases.

The purpose of this filing is to address whether the PSB is preempted under federal law from taking regulatory action against Entergy VY in response to leaks of tritium to groundwater and surface water. As set forth in our motion to intervene, the Vermont Natural Resources Council's (VNRC) and the Connecticut River Watershed Council's (CRWC) interest in this Docket is to ensure that appropriate action is taken by Entergy VY to address the long and short term impacts that the leaks have on Vermont's public trust waters (the Connecticut River and groundwater contaminated by Entergy VY). Consistent with our motion to intervene, VNRC and CRWC focus its arguments in this filing on the PSB's authority to address the impacts on the leaks at Entergy VY on Vermont's public trust resources.

As set forth below, the PSB clearly has the authority to address the leaks that have occurred at Entergy VY. Specifically, the PSB has an affirmative duty to protect Vermont's public trust resources, Entergy VY has harmed Vermont's public trust resources, federal law does not preempt the PSB from fulfilling its obligation to protect Vermont's public trust resources, and the public trust violations committed by Entergy VY create economic harm that the PSB has the authority to address.

## **II. GROUNDWATER AND SURFACE WATER ARE PUBLIC TRUST RESOURCES**

The trust in Vermont's surface waters is long-established under the common law, finding its basis in historical precedent from the Vermont Supreme Court and the United States Supreme Court. *Hazen v. Perkins*, 92 Vt. 414, 251 (1918) (state must "preserve

such waters for the common and public use of all”); *State v. Cent. Vt. Railway, Inc.*, 153 Vt. 337, 341 (1989) (“lands submerged beneath navigable waters are ‘held by the people in their character as sovereign in trust for public uses’”) (citation omitted); *Ill. Cent. R.R. Co. v. State*, 146 U.S. 387, 436-37 (1892) (public trust doctrine applies to navigable-in-fact waters). It also derives support from Vermont’s Constitution, which affirms the public’s right to fish in boatable waters, and it has been verified by Vermont statute, which provides guidance to “aid in the fulfillment of the state’s role as trustee of its navigable waters.” Vt. Const. chap. II, § 67; 10 V.S.A. § 1421. “Navigable” waters are those that are capable in their “natural state of being used for purposes of commerce, carried on in any mode.” *Boutwell v. Champlain Realty Co.*, 89 Vt. 80, 111 (1915).

The public trust doctrine recognizes that “the people of each state [have] ‘absolute right to all . . . navigable waters and the soils under them for their own common use.’” *Cent. Vt. Railway*, 153 Vt. at 342 (citation omitted). As highlighted by the Vermont Supreme Court, the doctrine stems from Roman times and reflects a concern for the public’s rights in a precious resource:

“For centuries, land below the low water mark has been recognized as having a peculiar nature, subject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics. Historically, no developed western civilization has recognized absolute rights of private ownership in such land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman Law nor the English common law as it developed after the signing of the Magna Charta would permit it.”

*Id.* (citing *U.S. v. 1.58 Acres of Land*, 523 F. Supp. 120, 122-23 (D. Mass. 1981)).

Vermont is unusual in that our constitution provides that citizens have the right to “hunt, fish and fowl in seasonable times under the regulation of the state.” Vt. Const. Ch.

II, § 67. Vermont Constitution. Accordingly, under Vermont's Constitution, Vermont's wild animals, fish and birds are public trust resources. *State v. Haskell* 84 Vt. 429, 79 A. 852, 854 (Vt. 1911). The protection of these resources is every bit as much the responsibility of the state to protect as ground and surface water.

The trust in Vermont's groundwater shares similar philosophical underpinnings with public trust in surface water and Vermont's fisheries. Vermont law states that "the groundwater of Vermont is a precious, finite, and invaluable resource upon which there is an ever-increasing demand for present, new, and competing uses" and asserts the interests of public "citizens who hold and share rights in such waters." 10 V.S.A. § 1390(2), (5). Groundwater in Vermont was clearly established as a public trust resource by statute in 2007. Under this statute, Vermont law provides that "the groundwater resources of the state are held in trust for the public." 10 V.S.A. § 1390(5).

### **III. THE STATE OF VERMONT HAS AN AFFIRMATIVE OBLIGATION TO PROTECT PUBLIC TRUST RESOURCES**

As noted above, the State's public trust duties regarding groundwater resources are clearly established by statute. Vermont statutes state that the State "*shall manage* its groundwater resources in accordance with the policy of this section." 10 V.S.A. § 1390(5). The "policy of this section" includes proper regulation of groundwater withdrawals, groundwater quality, and management of groundwater as a public trust resource. 10 V.S.A. § 1390 et. seq.

The State's authority to protect public uses in surface waters has been described in various ways, all of which point to an "ineluctable duty to exercise [the] power . . . to supervise trust property in perpetuity." *Cent. Vt. Railway*, 153 Vt. at 346. Though the



obligation is sometimes framed as a prohibition against conveying public trust property except to serve trust purposes, the actual “core of the public trust doctrine is the state’s authority as sovereign to exercise a *continuous supervision and control* over the navigable waters of the state and the lands underlying those waters.” *Id.* at 345 (citation and internal quotations omitted) (emphasis added).

As an instrument of the State of Vermont, the PSB shares these public trust responsibilities. The public trust responsibilities are also consistent with the PSB’s statutory obligation to “promote the general good of the State” through its Certificate of Public Good determinations. 10 V.S.A. § 231(a). Thus, where public trust uses or interests are implicated in PSB proceedings, the PSB has a duty to consider them and ensure that its actions do not impair those uses or interests. This is consistent with Vermont precedent on the authority of state tribunals to “assure the protection of public trust uses.” *In re: Dean Leary*, Docket No. MLP-94-08, Memorandum of Decision at 1, 3, 4 (Vt. Water Res. Bd. Apr. 13, 1995) (explaining that Water Res. Bd. had duty “as trustee of the public waters of the state to determine whether an encroachment subject to its review impairs public trust uses” based on its “common law trustee responsibility to safeguard public trust property,” regardless of whether encroachment rules had been adopted to guide its analysis) (also citing supportive case law from other jurisdictions). *See also* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 *Envtl. L.* 91, 94, 103 (noting that “[s]cores of cases” support a duty of protection and many “impose[] an affirmative obligation on

government,” and advocating that the “trust doctrine supplies a firm obligation that can steer agency discretion to carry out the protective goals of . . . statutes”).

In this proceeding, the PSB can and must fulfill its public trust responsibilities by considering the potential impacts of Entergy VY’s tritium leak on Vermont’s public trust waters – both the Connecticut River, the fish in the river and the groundwater surrounding the plant – and by taking actions necessary to protect these resources.

#### **IV. ENTERGY VY HAS HARMED VERMONT’S PUBLIC TRUST RESOURCES**

It is indisputable that the leaks at Entergy VY have harmed the Connecticut River and groundwater. There is no dispute that Entergy VY leaked radioactive material and radionuclides into the environment. EPA has set tritium standards in drinking water at the equivalent of 20,000 picocuries per liter. The tritium levels at Entergy VY have been measured as high as 2.45 million picocuries per liter. Accordingly, the leaks have contaminated groundwater.

In addition, Entergy VY has admitted that the tritium-affected groundwater has reached or will in the future reach the Connecticut River. Testimony in the record indicates that tritiated groundwater is being discharged into the Connecticut River along a stretch of shoreline that is greater than 300 feet in length and that soil below the Entergy VY Station, groundwater beneath the Entergy VY Station and the Connecticut River all contain radionuclides or other radioactive materials as a result of the leakage.

Entergy VY has argued that harm to Vermont’s groundwater from the leaks is mitigated because the contamination is to groundwater under Entergy VY property. Entergy VY’s argument on this point is contrary to Vermont law. As discussed above, groundwater in Vermont is a public trust resource. 10 V.S.A. § 1390(5). As such,

groundwater must be managed by the State in the best interest of all Vermonters, and groundwater is not owned or controlled by any entity other than the state of Vermont. In fact, Vermont statutes specifically provide that groundwater resources of the state are held in trust for the public and shared by all Vermonters. 10 V.S.A. § 1390(2) and (5). Accordingly, ownership of property is not relevant to the obligation to protect groundwater in Vermont.

Furthermore, as VNRC and CRWC witness Kim Greenwood outlines in her prefiled testimony in this matter, Vermont's groundwater classification rules dictate that groundwater must be managed regardless of property ownership. Under Vermont law, groundwater is classified as Class III unless otherwise designated by the Agency of Natural Resources. 10 V.S.A. § 1394(b). There is no dispute that the groundwater in and around the Entergy VY site is Class III. Under Vermont law Class III groundwater must be "suitable as a source of water for individual domestic water supply, irrigation, agriculture use and general industrial and commercial use." 10 V.S.A. § 1394(a). Accordingly, the groundwater under the Entergy VY site must be suitable as a source of water for individual domestic water supply, irrigation, agriculture use and general industrial and commercial use. It is irrelevant whether the groundwater Entergy VY has contaminated is under the Entergy VY site, is off site, or is currently being used as a source of water for individual domestic water supply, irrigation, agriculture use, or general industrial and commercial use. Vermont law does not allow for contamination of water if the contamination is contained within property boundaries, and Vermont law does not require that groundwater be managed for current uses. To the contrary, Vermont law explicitly states that Class III groundwater must be suitable as a source of water for

individual domestic water supply, irrigation, agriculture use and general industrial and commercial use at all times – meaning now and in the future. Obviously, groundwater that is contaminated with tritium does not meet the Class III standard for groundwater in Vermont. Accordingly, Entergy VY has harmed Vermont’s public trust groundwater resource by contaminating the groundwater under the Entergy VY site, and, therefore, the groundwater is not being properly managed as a public trust resource.

The facts also show that Entergy VY harmed the Connecticut River. As noted above, there is no dispute that tritium from the leaks at Entergy VY have reached the Connecticut River. The Connecticut River is classified as Class B cold waters its entire length except for water behind certain hydroelectric dams where excessive nutrient loading has stimulated plant growth that when it dies and accumulates in the lower reaches of the reservoirs rots leading to lowering of the dissolved oxygen level below VT and NH Water Quality Standards. See State of Vermont Agency of Natural Resources Clean Water Act 303(d) List of Impaired waters. No such problems are known to exist in the reach of the river affected by the tritium leak. The Vermont class B standard is “swimmable and fishable.” The discharge of tritium from Entergy VY to the Connecticut River without a permit inherently calls into question whether the Connecticut River is “fishable and swimmable” at the point of discharge.

It is important to note that the discharge of tritium is to Vermont waters. The United States Supreme Court has ruled that the Connecticut River belongs to New Hampshire up to the mean low water mark on the Vermont shore of the river. *Vermont v. New Hampshire*, 289 U.S. 593 (1933). There is no dispute that the discharge of tritium from Entergy VY is to the Vermont part of the Connecticut River. Accordingly, the

discharge is to waters that are under the management of the public trust as defined in Vermont and also subject to the Vermont Water Quality Standards.

In sum, there is no question that VY has harmed Vermont's public trust groundwater and surface water resources. The only question is to what extent these public trust resources have been harmed and what actions Entergy VY should be required to take to address this harm.

## **V. FEDERAL LAW DOES NOT PREEMPT THE PSB FROM FULFILLING ITS OBLIGATIONS TO PROTECT VERMONT'S PUBLIC TRUST RESOURCES**

Congress may preempt state authority either expressly or impliedly where the "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room to supplement it" or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205, 204 (1983)(hereafter referenced and cited as *PG&E*). The analysis "must be guided by two cornerstones of . . . preemption jurisprudence." *Wyeth v. Levine*, 128 U.S. 1194 (2009). "First, the purpose of Congress is the touchstone in every preemption case. Second, in all preemption cases, and particularly in those in which Congress has legislated in a field in which the States have traditionally occupied we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1194-5 (internal citations omitted). "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal

interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.” *Id.* at 1200 (internal citations omitted).

The Supreme Court’s Atomic Energy Act (AEA) preemption jurisprudence recognizes the tension between state and federal regulation and Congress’ willingness to tolerate it:

. . . Congress, in passing the 1954 Atomic Energy Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of *need, reliability, cost and other related state concerns*.

*PG&E* at 206 (emphasis added). In *PG&E*, the Court recognized state authority in this “dual regulation of nuclear-powered electricity generation” over land use and rate-making. *Id.* at 213.

The Supreme Court has also recognized that under certain circumstances, state law may cross into the preempted field of nuclear safety. See *PG&E*, *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984); and *English v. General Elec. Co.*, 496 U.S. 72 (1990). Importantly, each time it has addressed the issue of state preemption and the AEA, the Supreme Court has found held that states were not preempted from acting even where state laws touched on matters of radiological safety. See *Id.*

Ultimately, the Supreme Court has found state law not to be preempted under the AEA where (1) there is a non-safety rationale for the regulation, (2) there is not an irreconcilable conflict between state and federal law; (3) the state standard would not frustrate the objectives of federal law; or (4) where there is not a “direct and substantial” affect on decisions related to radiological safety. *Id.* Based on these factors, the PSB is

not preempted from protecting the public trust in surface and groundwater from the leaks at Entergy VY.

There is clearly a non-safety rationale for the PSB meeting its affirmative duty to protect groundwater and surface water from the contamination caused by Entergy VY. This rationale is the management of these public trust resources in the best interest of Vermonters as required by law. This obligation has nothing to do with regulating the safety of Entergy VY, and it has everything to do with ensuring that Entergy VY is not allowed to impair state public trust resources with impunity.

This leads directly to the second factor of the preemption test, whether there is an irreconcilable conflict between state and federal law. Clearly there is not. With regard to groundwater, the State's obligation to protect and manage public trust resources is born entirely out of state law. 10 V.S.A. § 1390 et. seq. There is no federal groundwater law that protects and manages groundwater as a public trust resource. Nor does the AEA address groundwater contamination or managing groundwater as a public trust resource. Similarly, the AEA does not specifically address water pollution or protecting surface water as a public trust resource. Accordingly, there is no conflict between state and federal law.

Protecting groundwater and surface water will not frustrate the objectives of federal law. As the Vermont Supreme Court set forth in *PG&E* decision, the AEA's objective is to promote nuclear power. *PG&E* at 222. The objective of the AEA will not be frustrated if Vermont is allowed to implement its state laws the protect Vermont's public trust resources. As the Vermont Supreme Court has held the AEA's objective to promote nuclear power is "not to be accomplished at all cost" and upheld "the continued

preservation of state regulation in traditional areas.” *Id.* Vermont’s authority to protect and manage groundwater and surface water is a traditional area of state regulation that is entirely consistent with the holding in *PG&E*. *Id.*

Finally, if the PSB addresses the impacts of the leaks at Entergy VY on groundwater and surface water it will not have a direct and substantial effect on decisions related to radiological safety. Requiring Entergy VY to stop the leak of tritium does not have any impact on radiological safety. There has been no suggestion by any party, nor did the PSB indicate in opening Docket 7600, that it was going to investigate how to address radiological safety issues at Entergy VY. To the contrary, the PSB and the parties in Docket 7600 are addressing what should be done about the contamination of groundwater and surface water at Entergy VY. The concern and remedy to address the leaks at Entergy VY will go to the long-term protection of these resources and the actions necessary to correct the harm that has already occurred, not to radiological safety.

#### **VI. ENTERGY VY HAS VIOLATED VERMONT LAW OTHER THAN PUBLIC TRUST PROTECTIONS THAT PSB HAS THE AUTHORITY TO ADDRESS**

VNRC and CRWC submit that in addition to the public trust in groundwater and surface water, the leaks at Entergy VY have violated a number of Vermont environmental laws, and the PSB has the authority to address these violations in Dockets 7600 and 7440. At a minimum there are questions about whether Entergy VY has illegally discharged tritium to groundwater and the Connecticut River and whether Entergy VY is required to obtain a variety of discharge permits related to the leaks. Because the issue before the PSB at this point in the proceeding is jurisdictional, it is not necessary to delve into the nature and extent of the potential permit violations related to the leaks. However, it is



clear under *PG&E* that the PSB has the authority to address these potential violations of state law that do not relate to radiological safety as a traditional area of state regulation.

*Id.*

## **VII. THE LEAKS AT ENTERGY VY HAVE CREATED ECONOMIC HARM THAT THE PSB HAS THE AUTHORITY TO ADDRESS**

In addition to the arguments above, the leaks at Entergy VY have created economic harm that it is clearly within the PSB's authority to address. For example, as Kim Greenwood testified there will be a need to clean up the tritium contamination that has already occurred and the cost to this clean up that has not been quantified. The cost of cleaning up of the tritium will have economic consequences for the state of Vermont that are clearly not preempted under any of the AEA preemption jurisprudence. See *PG&E, Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984); and *English v. General Elec. Co.*, 496 U.S. 72 (1990).

Along these same lines, there is an economic impact to the contamination of groundwater to the point where it no longer meets Class III groundwater standards. As noted above, Class III groundwater must be "suitable as a source of water for individual domestic water supply, irrigation, agriculture use and general industrial and commercial use." 10 V.S.A. § 1394(a). Because the groundwater does not meet Class III standards, this has economic impacts on the use of the aquifer for water supplies and commerce that has the potential to affect land use planning and development in and around the Entergy VY site for decades to come. The issue is as simple as if the water is contaminated it will affect property values, the ability to develop property in the area, and the ability to plan

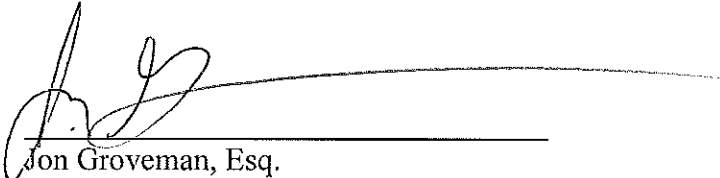
for growth in the area in the future. These are all economic impacts that are squarely within the PSB's authority to address.

Finally, there are adverse economic impacts related the leak of tritium to the Connecticut River. The river is a destination fishery for riverine species of fish. See U.S. Fish and Wildlife Service, Connecticut River Web Site <http://www.fws.gov/r5crc/Fish/fish.html>. Perception is reality and the fact that tritium is leaking into the river creates a perception that the river is not safe and this can only discourage people from coming to Vermont to fish the Connecticut River. Economic impacts associated with the perception that the Connecticut River is not safe are also within the PSB's purview.

#### **VIII. CONCLUSION**

For all the reasons set forth above, the PSB is not preempted from implementing Docket 7600, and pursuing remedies to address the leaks at Entergy VY.

Respectfully Submitted,

  
\_\_\_\_\_  
Jon Groveman, Esq.  
*Attorney for All Appellants*

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Signed in Montpelier, Vermont, this 27<sup>th</sup> day of August 2010.